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JAMES H. MCKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF OF APPELLEE TO BRIEF AND MOTION OF APPELLANT.

The position assumed by the appellant herein is of a character calling for reply, as well as protest, against the manner of presenting to this court, in an entirely *ex parte* manner, alleged facts that are not in the record, and then attempting to fortify its position on the merits by assuming such alleged facts, outside of the record, to be facts proved below and undisputed.

Appellant, having thus brought to the attention of this court an entirely unauthorized *ex parte* showing, proceeds to contend upon the premises so erected, that the solemn judg-

ment of the Court of Claims is lacking in merit on the facts and erroneous in law.

The method employed by appellant in filing motion for additional facts, accompanying the same by an *ex parte* affidavit undertaking to state what is the *undisputed* evidence in the court below, and attaching thereto copies of certain motions made in the court below, and then treating all these matters as part of the record in the case, would seem to be as lacking in precedent as it is improper.

The necessary effect of the position here assumed by appellant is to ask this court to weigh what appellant assumes the evidence below to have been, and then to have the decision herein reviewed, not upon the ultimate facts found by that court, as by law required, but upon the evidence alleged to be found in the record below.

In closing the brief in support of its motion, appellant states:

> "It remains only to add that, as appears from the affidavit of Mr. Ashbaugh and the accompanying papers, the Government exhausted every effort to obtain findings on the stated points without success" (p. 16).

This sentence is completed as follows:

> "Although they are undisputed on the record" (p. 16).

To this latter statement counsel for appellee take most positive exception, and insist that the Court of Claims, in its findings of ultimate facts, has found every fact in any way essential to a fair understanding of this case; and that the facts now requested were not found by the Court of Claims in the manner now insisted upon by the appellant, because the evidence did not support them and, further, because they were deemed immaterial to the issues involved.

Counsel for the Government, at the time of its motion for a new trial; again in its motion for new findings of fact, and,

finally, in motion to include in the record on appeal the several motions now annexed to said motion to remand this case for additional findings of fact, requested the Court of Claims to put in this record, either as ultimate facts or as part of the record on appeal, substantially the additional facts it now requests. This the Court of Claims, after the fullest consideration and with the testimony all before it, refused to do.

Failing in that attempt, counsel for appellant, by filing the present motion, affidavit, and annexed motions and briefs, have now done exactly what the Court of Claims refused to allow.

Counsel insist that appellant has no right to urge upon the consideration of this court matters that are outside of the record, and yet, in opposing the showing made by appellant, it is necessary to make some mention of what is or is not shown by the record below, to the extent that such matters are here relied upon by appellant, lest by silence counsel be deemed to acquiesce in the Government's contentions.

Motion for Additional Findings of Fact.

I.

It is entirely immaterial to the issues involved in this case whether or not the officers of the Isthmian Canal Commission knew what was in the contract made with the appellee when the same was signed. The Court of Claims (R., 21-22) has found that the contract was properly entered into between the United States and the appellee, and that it was a valid and binding contract. Quoting from the opinion of Judge Atkinson:

> "The litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants," etc. (R., 23).
>
> "The findings fail to reveal misrepresentation and fraud by claimants, but reveal a degree of negligence on the part of the agents of the defendants from

> which they cannot be allowed to extricate themselves by the abrogation of a duly executed contract in order to shield themselves from responsibility" (R., 25).

The conclusion reached by the Court of Claims was, not whether or not the officers of the Government knew what was in the contract, but if they did not know, then it was due to their own negligence and not to any fault of appellee.

Quoting again from Judge Atkinson's opinion (R., 25):

> "When a contract is duly signed prior negotiations become merged in it, and to ascertain the intention of the parties thereto we must look to the contract alone. If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intentions. It merges all prior and contemporaneous negotiations. Extrinsic evidence is inadmissible in an action on a written contract to show the understanding of the meaning and effect of such contract entertained by one or both of the parties thereto when the contract was entered into (Page on Contracts, sec. 86, 1189, 1193).
>
> "If a party to a contract is able to but does not read it, then he is negligent, and cannot plead this negligence in his defense. 'Some courts lay it down as a broad principle that one who enters into a contract under mistake of fact due to his own negligence, concerning which he could with reasonable diligence have learned the truth, cannot have relief' (Page on Contracts, sec. 80).
>
> * * * * * * *
>
> "Page on Contracts, section 79, further says:
>
> "'Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity and not acting under fraud, misrepresentation, duress, or undue influence goes through the outward form of binding himself by contract, he cannot avoid liability thereon by claiming that unknown to the adversary party he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer. A mistake of this kind (*i. e.* mistake as to the subject-matter

> of the contract) is generally inoperative, because parties are bound by what they say and do, and the courts will not consider what they think and believe, in the event of a difference between the two. If an article bought does not possess the qualities attributed to it by the purchaser the case is governed by the maxim *caveat emptor*, unless the seller has caused the mistake by his fraud or unless there has been a warranty.'"

After the reargument of this case in the Court of Claims on motion for new trial the court handed down another opinion by Judge Atkinson (R., 26-27-28), which reaffirmed and approved the doctrine laid down in the previous opinion.

There is enough in the record to show that the negotiations leading up to the execution of the contract now in suit were conducted by D. W. Ross, general purchasing agent of the Isthmian Canal Commission; that the contract was in fact prepared in his office, and that it was with him that the appellee had the various interviews and correspondence, etc., relating to this contract. And it may be remarked that inasmuch as the Government failed to put Mr. Ross on the stand, it will be impossible for the Court of Claims to state what Mr. Ross understood or "knew before or by the time of the execution of writing sued on."

And it may also be remarked that the record below (p. 119) showed that Mr. Maltby, principal assistant engineer of the Panama Canal Commission, never saw the contract made by the Government with the appellee, and that Mr. Shonts, chairman of the Isthmian Canal Commission, if he did not know that there was a change in the size and weight of the materials made by the terms of the contract, it was due to his own negligence.

Counsel for appellee believe that the findings of ultimate facts heretofore made by the Court of Claims, as explained and amplified by the opinions filed by the court, show conclusively that if the officers of the Government did not know that there was a reduction in the size and weight of certain

component parts of the dredge, then such ignorance on their part was due to negligence. If this be so, then the question of whether or not the officers of the Isthmian Canal Commission did or did not know is entirely immaterial, and the Court of Claims properly refused to find, under the testimony in the case, that the said officers of the Isthmian Canal Commission did not know of the reduction in size and weight of the component parts of the dredge.

II.

Nothing would be added to the clearness of the facts found by the court below by the additional finding now requested, as the second request in the motion here filed in that behalf. The Court of Claims has found that the dredges proposed by claimants and contracted for by the Government were reduced in both weight and strength from the dredges suggested in the specifications annexed to the printed advertisement calling for proposals for the construction of these dredges. The amount of this reduction in actual figures is immaterial and can have no effect whatever on the legal questions involved in the decision of this case.

Quoting from Judge Atkinson's opinion (R., 27):

> "While it is true, as argued at bar, that there was a material difference between the claimant's first bid for the construction of the six barges for the Isthmian Canal Commission (under the Government's advertising circular, No. 310-C, which specified the size and strength of the barges desired by said commission), yet it was so specifically and clearly stated by the claimant in its second bid for the construction of the desired barges, the strength, weight, and measurement of the same being in detail specifically set forth, all which being agreed upon as shown by the contract, that we cannot see any means of escape for the defendants upon either the law or the facts involved.
>
> "The Government's proposal in its specifications was for the construction of six steel dump barges,

> The bid of the claimant was for six steel dump barges. The specifications suggested that the barges should be of a certain length, beam, and draft. The bid of the claimant proposed to construct barges of the same length, beam, and draft. The specifications called for a certain carrying capacity. The bid covered specifically these requirements. The specifications required the rake, hoppers, with water-tight bulkheads, inclination of hoppers, method of bolting same, etc. The bid proposed the construction of barges meeting all of these requirements. In short, the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendants' circular No. 310-C."

And again (R., 28):

> "Nor do we agree, as contended, that there was a substitution of different strength and material for those provided in the specifications of the defendants as to the manner of constructing the barges. On the contrary, it would be rather a modification thereof. It is admitted that the defendants desired barges of a certain weight and strength, but when it was learned that they could not be manufactured for anything like the price expected by the agents of the defendants the claimant tendered a bid to construct barges of the same dimensions but of less strength and weight, which bid was accepted and a contract was drawn thereunder and was duly signed and executed by the parties thereto."

III.

The same argument would apply to the third request for additional findings of fact. The amount of difference between the component parts of the dredge suggested in the specifications annexed to the advertisement and the dredge which was actually contracted for by the Government, it is submitted, can have no bearing upon the decision of this

court. The Court of Claims refused on three separate occasions to incorporate this difference as an ultimate finding of fact, or in the form of a *statement by counsel* as part of the record. This it did after full opportunity of judging whether or not this difference in detail had any bearing whatever on the case.

The request now made for three additional findings of fact is an attempt to get before this court, not ultimate facts, but evidence tending to establish ultimate facts. The manifest purpose and object of the motion is to get the facts now requested to give color to the pretence of appellant that there was some fraud or misrepresentation on the part of claimants in getting the Government to execute the contract now in suit, whereas the court below expressly negatived the contention (R., 25).

This attempt is clearly shown in the brief filed by appellant in opposition to the motion to dismiss or affirm; the impropriety of any statement or argument based on the assumption that the appellee was guilty of any fraudulent conduct or misrepresentation in connection with this contract will be subsequently pointed out in detail.

It is respectfully submitted that the record in this case gives this court in the fullest way all the material facts which have been proved in this case.

The petition with the annexed exhibits filed is clear and explicit. The findings of fact are full and sufficient, and when this court has before it, in addition, the two full opinions filed by Judge Atkinson, there can be no question that the court is in possession of every fact that is necessary to enable it to arrive at a clear understanding of both the merits of this case and the law.

In this connection, the case of Mahan *vs.* U. S. (14 Wallace, 109) is interesting.

The court (Miller, J.) says:

> "It is not possible to look at the first three rules adopted when the appellate jurisdiction of this court was first exercised, without seeing that the purpose

was to bring nothing here for review but questions of law leaving the Court of Claims to exercise the functions of a jury in finding facts equivalent to a special verdict and with like effect.

"In practice it was found that the Court of Claims did not in many cases, make the necessary finding of facts until after they had rendered their decree and complaints were made here that the findings were often insufficient to present the law points on which parties relied and of which they desired a review in this court.

"To remedy these evils the fourth and fifth rules were adopted at the December Term, 1869.

"The fourth requires the Court of Claims to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request that as to that point the court will make a finding. But it was never supposed that the party would ask or the court must find the fact to be as the party claimed it and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first."

The fifth rule referred to in this decision is substantially like the present fifth rule. Except as subsequently shown, the last part of the rule allowing the record to this court to contain the overruled requests for findings of fact has been omitted. Under the rule as it then existed the court states that the requests for findings of fact and refusal can be made a part of the record and that then this court can determine whether said requests are so material as to require the case to be sent back for the findings requested. Concluding the opinion, the court says:

"In the present case the Court of Claims did make a very explicit finding on the questions of fact pre-

sented by the request of plaintiff, and this is all the rule required, though the finding is contrary to her averment."

Counsel for appellee maintain that the findings heretofore made cover the requests now asked for, and that the appellant is not entitled to demand further findings of fact.

Affidavit of S. S. Ashbaugh.

In that affidavit (of counsel) the affiant undertakes to state *his opinion* of what was proved by the evidence given before the Court of Claims. He further makes the statement that "all of said evidence was undisputed." The affidavit states that neither Mr. Shonts nor Mr. Maltby knew before or at the times of the execution of the contract that the dredge contracted for could not be built according to the modified specifications of the Government without exceeding in weight two hundred and sixty thousand (260,000) pounds. It fails to state why the officers of the Isthmian Canal Commission did not know it. From the evidence and admissions in the case made by Mr. Shonts and Mr. Maltby, it is evident that they should have known this fact and the Court of Claims, in the opinions by Judge Atkinson before referred to, has so decided. The affidavit fails to recite the fact that Mr. Ross, general purchasing agent of the Isthmian Canal Commission, who conducted the negotiations with appellee, was not put upon the stand by the appellant, and that, therefore, it is impossible to know what his knowledge in this respect was.

It cannot be argued that appellee was under any duty to explain to each and every one of the officers of the Isthmian Canal Commission what it proposed to furnish under the contract. If Mr. Ross knew, this was sufficient as far as the Government is concerned. We think the assumption a fair one that as Mr. Ross was not put upon the stand by the Government, and as all the negotiations for the purchase

of these dredges were conducted by him, he knew exactly what the Government expected to get when it entered into the contract of August 17, 1906, with appellee. The record itself shows that Mr. Maltby's attention was directed particularly to the weight of the dredge proposed to be furnished by claimants (R., 12, 13), and this before the contract was entered into. This was done by appellee's letter of July 27, 1906, and was in answer to Mr. Maltby's letter (R., 13) of June 26, 1906, calling Mr. Ross' attention to the fact that the Ellicott Machine Company's drawings did not show any details as required in the specifications. Appellee's letter of July 27, 1906, states as follows (R., 12, 13):

> "We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire. * * *
>
> "We take this opportunity to call your attention to the bid of the next lowest bidder, Winant, of Brooklyn, N. Y.
>
> "A schedule of displacement on this bid will show as follows:
>
> | | |
> |---|---|
> | Displacement of hull as shown on maximum permissible draft line of 8′ 0″—20,263 cu. ft. at 65 lbs.... | 1,317,095 lbs. |
> | Deduct weight of minimum permissible load—350 cu. yds. at 3,240 lbs. | 1,134,000 " |
> | Net weight of barge including equipment ..... | 183,095 lbs. |
>
> "From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge."

A dredge being nothing more than a square iron box, the price of the same is based principally on the weight of

material in it. Both from the contractor's and purchaser's standpoint, therefore, the weight of the dredge is the most important feature.

The Court of Claims decided that there was no fraud or misrepresentation on the part of appellee (R., 25), and the necessary assumption from this is that the Government officials must have understood appellee's proposal; and, if they did not, then they were guilty of such gross negligence that they cannot escape on the theory that they did not so understand it. The tabulated statement appearing in Mr. Ashbaugh's affidavit was not produced as testimony in the case in the form given. It is a tabulation made by counsel from testimony given in the case and we do not admit its accuracy. Taking, for example, the last item shown on this tabulation, we find:

"Item.	Government specifications.	Claimant's bid.	Percentage of reduction.
Net weight....	45,000 lbs.	26,000 lbs.	45"

A simple calculation will show that the figure giving the percentage of reduction is not 45 per cent, but 42.23 per cent.

The affidavit and also the brief filed by counsel in this case, while laying great stress on the amount of reduction in weight of the component parts of the dredge, make absolutely no reference to the corresponding *reduction in price* for which appellee offered to build the dredge. As shown by the record (R., 1 and 24), appellee proposed to build a dredge in strict accordance with the Government specifications annexed to the advertisement for $148,000. The dredges of lighter weight were offered to be built at $101,400 (R., 2, 7, 11, etc.). This reduction in weight, therefore, here so ingeniously complained of by appellant, was accompanied by a corresponding reduction in price, and when the Government refused to carry out this contract with appellee the cheapest bid for which it could get the dredges built on the unmodified specifications was on the bid of

$149,000 by the Newport News Shipbuilding Company (R., 24).

The unfairness of the position taken by appellant is shown fully by the testimony before the court below, but enough is in the record in this case to give this court information upon this point.

In the petition filed (R., 5) the following language appeared:

> "And that in answer to this information claimant wrote, under date of September 15, 1906, to said D. W. Ross, stating that it was willing to return to the original specifications as to framing and plates, but if this was insisted upon it would decrease the displacement to some extent, and consequently the carrying capacity of the barges; otherwise the weight of the barges would exceed the total called for in the contract, namely, two hundred and sixty thousand (260,000) pounds.
>
> "Claimant further suggested in this letter that the original specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract."

Annexed Overruled Motions.

The motions annexed to the motion for additional findings of fact were properly refused by the Court of Claims, and the action of that court in not allowing them to be incorporated in the record on appeal was, without question, correct. They are simply *ex parte* statements on the part of counsel as to what they think has been proved by the evidence before the Court of Claims. The motions having been fully briefed and argued, and having been refused by the Court of Claims, and, in addition, that court having specifically refused to incorporate them in the record on appeal, the attempt to bring them before this court in the manner now adopted ought not to be countenanced.

Brief in Support of Motion.

The rules of this court contained in the brief filed in support of the motion by the appellant are clear and specific and indicate exactly what should be contained in the record of a case appealed from the Court of Claims. Rule 2 states that the Court of Claims should find the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them.

The requests now made do not constitute ultimate facts, but are merely evidence tending to establish such facts. (See U. P. Ry. Co. *vs.* U. S., 116 U. S., 154.) The additional facts requested are not "vital facts." In the case of U. S. *vs.* Adams (9 Wall., 661), quoted by appellant, the court says:

> "But we cannot give the Court of Claims any directions as to what finding it shall make or how it shall proceed to make up its finding on the points in question. If that court should refuse, with the proper evidence before it, to find the material facts desired by either of the parties, the proper remedy would be to make a request that such finding be made and to except in case of refusal."

The motion for additional findings of fact should not be allowed and the annexed affidavit and motions should not be taken as part of the record.

Appellant in its brief relies for the propriety of the present motion upon the case of U. S. *vs.* Adams, *supra*. It appears from that case that the rules 4 and 5, relating to appeals from the Court of Claims, were not then in force.

In the opinion the court says:

> "Perhaps an additional rule on the subject would make the rights of the parties and the duty of the court less ambiguous than they now are."

That case was decided April 30, 1870, and it is to be observed that this court passed the following rules at the December term, 1869, subsequent to the opinion in said Adams case (see U. S. *vs.* Driscoll, 95 U. S.):

Rule 4:

> "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case."

Rule 5:

> "In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on appeal, to this court."

These rules were passed for the purpose of giving the party requesting a finding without success an opportunity to present the same in the record on appeal to this court.

The effect of the subsequent passage of these rules is to destroy the applicability of the Adams case (*supra*) to the case at bar.

The rules above set out are specifically referred to in Mahan *vs.* U. S., already referred to in this brief.

Upon further examination it appears that these rules were amended by this court January 29, 1879 (97 U. S.), and rules 4 and 5, relating to appeals from the Court of Claims, now read as follows:

Rule 4:

> "In all cases in which either party is entitled to appeal to the Supreme Court the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case."

Rule 5:

> "In every such case, each party at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

It will be noticed that that part of rule 5 requiring the incorporation in the record of this court of the requests for findings of fact and refusal thereof has been omitted from the present rule. This must have been done intentionally. When we consider this fact in connection with rules 1 and 2 of the Court of Claims (set out in paragraph 1 of appellant's brief in support of motion for additional findings of fact), relating to what matters should be incorporated in the record on appeal to this court, it is apparent that appellant is not entitled to have in this record the requests made for findings of fact which were refused by the Court of Claims.

Especially is this true when we consider that the facts now requested are substantially the same as previously requested by the appellant and refused by the Court of Claims.

The omission from the present rule of the latter part of said former rule 5, passed in the December term, 1869, indicates a desire on the part of this court not to go into the question of the action of the Court of Claims in respect of *overruled* requests or motions for findings of fact.

This is further emphasized by referring to rule 6, paragraph 1, of this court.

That rule is as follows:

> "All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion."

We do not think that it was intended by the language of this rule that the moving party should supplement his motion by *ex parte* affidavits and other writings not in the record of the case.

In U. S. *vs.* Griffith (141 U. S., 212) this court showed conclusively its attitude in this respect.

The opinion (Mr. Chief Justice Fuller) is as follows:

> "The motion by appellant for leave to dismiss its appeal in this cause is accompanied by certain correspondence which is referred to as stating the grounds on which the motion is made. We cannot be called upon to examine into these papers for the purpose of arriving at a conclusion as to whether the dismissal is justifiable or not, and must decline to permit them to be filed and to thereby leave it to be inferred hereafter that we may have acted upon them."

In the case of Hudgins *vs.* Kemp (18 How., 530), which is similar to this case in that appellant here uses the affidavit and other matters outside of the record to support his defense to appellee's motion to dismiss or affirm, the court (Chief Justice Taney) states as follows:

> "This case has been brought up to this court by appeal from the decree of the Circuit Court of the United States from the District of Virginia, and a motion is made on behalf of the appellee to dismiss it, upon the ground that it had not been removed in the manner the law requires, and that, therefore we have no jurisdiction over it. And certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted to this court, have been filed as evidence of the irregularity of the removal.
>
> "This evidence is not admissible upon the present motion. The record transmitted to this court, certified by the clerk of the Circuit Court, states that the appeal was taken in open court. This is sufficient evidence of that fact. And upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity, or to show that the certificate ought not to have been given. The case, as therein set forth, is the case before this court."

Appellant's Brief in Opposition to Motion to Dismiss or Affirm.

Before concluding the argument on this branch of the case, counsel for appellee wish to call the court's attention to certain statements contained and conclusions reached in the brief filed by appellant in opposition to the motion to dismiss or affirm. These statements which we object to are of three kinds: *First*, statements entirely outside of the record before this court and, we believe, contrary to the facts as stated in the findings of the Court of Claims and in the opinions of said court given by Justice Atkinson—these statements directly impugn the actions and motives of the appellee in making the contract in suit; *second*, statement of matters entirely unsupported by the record concerning other matters bearing more or less directly on the case; and, *third*, statements based on the matters set out in the affidavit of Mr. Ashbaugh and in the annexed copies of motions and brief, which statements counsel for appellant assume to have been proved as facts, to be undisputed, and found in the record.

We have already drawn attention to the fact that the Court of Claims, whose opinion on this question must be final, has decided that there was *not any evidence of misrepresentation, concealment, deception or fraud* on the part of the appellee (R., 25, 28). The Court of Claims came to this decision deliberately and after fraud, misrepresentation, etc., had been charged to appellee by counsel for the Government repeatedly and in most positive language, although not the slightest justification therefor is found in the testimony or record below.

The evidence presented in the case was full and complete on this point, and the position of appellee as being entirely innocent of any fraud, misrepresentation or disingenuous conduct was definitely proved by this evidence and found by the Court of Claims (R., 25, 28). Although this is a fact

and so shown by the record, we find in the brief filed by appellant in opposition to the motion to dismiss or affirm the following language (Brief, 6 and 7):

> "Especially in view of the disingenuousness of appellee's conduct in deliberately misleading the agents of the commission by means of language which seemingly amounted to an assurance that the specifications as to weight and size of materials would be complied with," etc.

(Brief, 20:)

> "* * * because the conduct of appellee shows conclusively that it deliberately led the officers of the canal commission to believe that its proposal was to construct barges in accordance with the specifications as to weight and size of materials. There can be no doubt about this. * * * Instead, appellee purposely used language which seemed to convey an assurance that the specifications would be complied with, and by that language secured the execution of the writing now before the court."

(Brief, 21:)

> "The Court of Claims entirely misconceived the real issue in the case. It proceeded upon the assumption that the language of the writing executed by the parties was clear and unambiguous, although it explicitly held that the explanation of it in appellee's letter of July 27 *was only sufficient to put the canal officers 'on inquiry.'*"

Returning to the record, we find as a basis for this statement the following language (R., 24):

> "The very fact of this great difference in the amounts of the bids, taken in connection with claimants' former bid of $148,400, it seems to us, was sufficient in itself to have put the defendants on inquiry. Attention was called to this fact by claimants in their letter of July 27, 1906 (Finding IV), to the defendants' division engineer, wherein attention was called to the weight of the barges proposed by the bid of a

> Brooklyn, N. Y., firm for $111,000, as compared with the weight of the barges which claimants proposed to build, which letter of claimants revealed the fact that the two firms were evidently bidding on a different character of barges. The attention of defendants was further called to this same fact by a conspicuous note on a large blue print prepared by claimants, which is attached to and is made a part of the contract, which note gives the net weight of the barges, and this weight was to be distributed in such manner as the defendants might direct."

It is unnecessary to point out that the language used in the appellant's brief is not supported by the record.

(Brief, 23:)

> "The conduct of one of the parties (meaning appellee) has been disingenuous and misleading, if not actually fraudulent."

(Brief, 37:)

> "Although the Court of Claims was of the opinion (as a matter of law—not as a matter of fact) that the facts in this case did not show fraud on the part of appellee, and although there is perhaps lacking such actual misrepresentation as would amount in law to fraud, still the record in this case does disclose a degree of disingenuousness on appellee's part which barely stops short of fraudulent misrepresentation, by means of which the canal commission was induced to execute the writing in question in the mistaken belief," etc.

(Brief, 38:)

> "Appellee deliberately refrained from making a frank reply to Maltby's letter and purposely suggested phraseology for the proposed agreement which was calculated to and did mislead the canal officers. That it pursued this course in the hope and expectation that its real purpose would remain undiscovered until the writing had been signed is too clear

> for argument, etc. A contract obtained by such means is clearly unconscionable."

(Brief, 39:)

> "* * * while here it is due to the disingenuousness of appellee's conduct inducing the canal officers to execute an instrument which, if construed as appellee construes it, is entirely different from the one which was intended by them."

Counsel for appellee contend that all the language quoted from appellant's brief is absolutely unsupported by the testimony in the case; that there is not in this case the slightest evidence whatever of any fraud, misrepresentation, or disingenuousness or misleading conduct on the part of appellee, and that the Court of Claims, with the testimony before it, has so found. The language in appellant's brief above referred to is, therefore, we think, entirely improper, and finds no warrant or justification.

The brief filed by appellant also states that "the Court of Claims refused to consider extrinsic evidence showing that the canal commission was in fact misled by the conduct of appellee," etc. (Brief, 7).

(Brief, 24:)

> "It further decided as a matter of law that extrinsic evidence offered for the purpose of showing that the officers of the canal commission did not so understand the arrangement was not open to consideration."

As a matter of fact the Court of Claims did not refuse to consider any evidence adduced at the trial; but, after consideration of all the evidence, the court refused to find facts which it did not deem to have been proved.

There are other statements of a similar character in the brief to which it seems unnecessary to call this court's attention.

The brief further assumes, as proved and as part of the record, matters and facts stated in the *ex parte* affidavit filed by S. S. Ashbaugh.

(Brief, 26:)

> "* * * and the fact is, as disclosed by the affidavit in support of the motion submitted with this brief, that said materials proposed to be used were of only about half the strength and weight of those required by the specifications."

It is respectfully suggested that this affidavit and the facts contained in it are not properly before this court, as part of the record, for the purpose of making deductions in appellant's brief to support its conclusions of law.

On page 38 of the brief the following language occurs:

> "* * * and shown on the record in the Court of Claims by the positive and uncontradicted testimony of the officers of the canal commission to which attention is called in affidavit in support of the Government's motion for additional findings of fact, submitted herewith," etc.

The fact claimed to be shown is not shown in the record, and appellant in its brief has attempted to tell this court what is shown by the testimony given by the officers of the canal commission appearing only in the record of the Court of Claims, and attempts to support the statement by reference to an *ex parte* affidavit which calls attention to the alleged fact. The language is clearly improper and should not be given a controlling effect by this court.

Reply Brief to Appellant's Brief in Opposition to Motion to Dismiss or Affirm.

The brief and accompanying motion of appellant so tends to cloud and confuse the simple issues of this case that it may not be improper to invite the attention of the court to matters actually in the record and which are open for consideration by this court.

In addition to the matters already referred to generally, there are parts of appellant's brief that are not properly open for consideration by this court.

Those parts are as follows:

(1) *Page 17, Brief, Division III.*

The point here made is a question of fact and not one of law. The Court of Claims decided that the contract in question was a legal and binding contract; that the language used in article 1 thereof, construed in connection with the letters and blue prints annexed to and made part of said contract, modified the specifications for said dredges contained in said contract, and that the manner in which appellees desired to perform said contract was in accordance with the terms thereof. This decision was rendered only after a careful investigation of all the facts surrounding the making of this contract and the evidence, written and parole, which the court had before it. There was, in the opinion of the Court of Claims, no ambiguity or indefiniteness about the contract and no mutual misunderstanding in reference thereto. It was and is perfectly plain that the modifications made by the bid and contract to the original specifications, annexed to the public advertisement, were clear and were understood by appellee and should have been understood by the officers of the Government. The question of what effect (other than that found by the Court of Claims) this modification had on the original specifica-

tions is, therefore, not open to consideration by this court. The Court of claims has decided that the contract is a valid and binding one, and that under this contract appellee had to build lighter barges in order to comply with the terms thereof, and this court cannot depart from this conclusion.

To illustrate that the point here propounded is a matter of fact and not of law.

Appellant undertakes to say why the Maltby letter of January 26, 1906, was annexed to the contract, and further states that the language of the contract was adopted with full knowledge on appellee's part that the Commission expected and would insist upon compliance with the requirements as to weight and size of materials. Counsel for appellee think the evidence in the case proves the exact contrary. The record is silent on this point.

Appellant says that nothing would have been easier than to suggest phraseology which would clearly show that the specifications were to be abrogated, and says it failed to do this. The testimony, however, shows that appellee made every attempt to explain to the Government what it intended to furnish, and both the appellee and the experts who testified said that they showed the Government clearly what was proposed to be furnished.

To meet the facts stated as facts in the brief filed by appellant it is apparent that we have to go entirely outside of the record before this court, and yet, if we do not deny the matters stated by counsel for appellant, it might be assumed that we admitted them. Without particularizing further, it is expressly controverted that the record in this court or the record in the Court of Claims support the facts stated in Division III of appellant's brief.

Referring to Division IV of the Brief.

It is also insisted that there is no evidence in the record, either here or in the Court of Claims, showing any ambiguity in the contract in suit; and it is submitted, as matter

of law, that a mistake in the subject-matter of a contract must be mutual in order to relieve the mistaken party from the consequences of his solemn and deliberate act in entering into a contract. It is further submitted that the Court of Claims did not hold, as matter of law, that it was immaterial that the minds of the parties never met; and, in conclusion, it is further controverted that the minds of the parties never met on this contract or that there is anything in this record to show that condition of fact.

We respectfully suggest that the whole Division IV of the appellant's brief is improper and brings up for discussion before this court matters not disclosed by the record.

Division VI of Appellant's Brief.

We suggest that the argument contained in this entire division is improper, as there is not one word in the record which permits the conclusion that the "contract was unconscionable."

This leaves of the appellant's brief for consideration by this court—

(1) The statement.

(2) Division I (being the argument on motion to dismiss).

(3) Division II (being the argument on motion to dismiss).

(4) Division V (relating to commission's authority to contract for a lighter barge than advertised).

These four divisions are, we think, the only questions disclosed by appellant's brief which are open for review by this court, and we will proceed to discuss them in the order given.

(1) *Statement.*

Appellant complains at the outset that the statement of the case contained in appellant's brief is insufficient. Counsel for appellee now make the same complaint against the

statement made by appellant. Instead of attempting to amplify the statement contained in our former brief, or to add to or correct the statement made by appellant, we respectfully suggest that the petition, findings of fact, and the two opinions of Justice Atkinson will give a clear and correct statement of the actual facts and proper deductions to be made therefrom.

(2) *Division 1, Appellant's Brief.*

It should be noted that in Brockett's case (2 How., 238), relied on in appellant's brief, the appeal was taken from a chancery court, and the rules of practice relating to the taking of appeals and the filing of petitions is different from the practice in the Court of Claims. In this case appellant had lost its right to appeal before it filed its petition, sixteen days having passed. The fact that the court opened up the case by considering the petition and subsequently reaffirming the decree necessarily would have the effect of dating the final decree June 9. Counsel for appellant will certainly not argue that in the Court of Claims the defeated litigant could allow a period of more than ninety days to elapse and then, by filing a motion for a *new trial* within the judgment term, revive *de novo* the period of ninety days if the motion for a new trial was subsequently overruled and the final decree was not renewed or re-entered, but allowed to stand as and when rendered as the final judgment of the court.

In the next case quoted in appellant's brief, Memphis *vs.* Brown (94 U. S., 715), the court decided that the form of the entry was equivalent to setting aside the judgment and entering it anew. Continuing the quotation commenced by the appellants, the court says:

> "As the writ was issued on the day of the order and its allowance embraced the entry recording the order itself, there cannot be any doubt of the intention of the court to give the judgment at that time such an effect."

We are prepared to admit that if the Court of Claims in overruling a motion for a new trial had explicitly at that time renewed or re-entered the judgment of May 18, that then the appeal would have been in time; but this was not done nor did the order of the Court of Claims have this effect. The case of Memphis *vs.* Brown, therefore, cannot have any bearing upon the present case.

In the next case, Aspen Mining and Smelting Company *vs.* Billings (150 U. S., 31), the decree was rendered October 20, 1890, and the motion for a rehearing was filed October 25, 1890. This motion was decided May 5, 1891, and *immediately* thereafter the appeal was prayed.

That case does not govern, because it is a proceeding in an equity court on a petition for a rehearing which the court entertained, and it is not comparable to a motion for a new trial before the Court of Claims, where the judgment itself is not affected by filing the motion unless the new trial is granted, and does not require to be renewed or re-entered when the motion is overruled. Not only this, but in the case under consideration the petition for a rehearing was filed five days after the decree and the appeal was filed immediately when the petition was overruled. The point now in question was not under discussion and was not decided by the court. This case is entirely consistent with the point now made, namely, that where the time limited for appeal, exclusive of the time during which the motion for a new trial is pending, has expired, then, unless the judgment is renewed or re-entered, the right of appeal is lost.

The same may be said of the next case quoted in Vorhees *vs.* Noye Manufacturing Company (151 U. S., 135).

There the motion for a rehearing was filed *immediately* after the decree. *At the same time* the defendant prayed for an appeal, which was allowed. The court denied the motion for a new trial, holding that "it is now too late to sustain said motion or interfere with the decree." There was no question in that case of any delay on the part of defendant in

praying for an appeal, as the appeal was prayed for *at the time* the motion for a rehearing was made. When the appeal was ready to be prosecuted the Supreme Court ceased to have jurisdiction and it was necessary to appeal to the Circuit Court of Appeals.

While the case of Kingman *vs.* Western Manufacturing Company (170 U. S., 675), next discussed in appellant's brief might upon first consideration be taken as opposed to appellee's contention, it is easily distinguishable therefrom. The court in that case says distinctly that the question before it is merely whether the judgment is final so that the jurisdiction of the appellate court may be invoked while the case is still under the control of the trial court, through the pendency of a motion for a new trial, and it only decides, so far as this case is concerned, that such appellate jurisdiction cannot be so invoked while a motion for a new trial is pending.

To illustrate the difference in practice between the Court of Claims and other courts we cite the case of U. S. *vs.* Young (94 U. S., 258).

In that case it was held that the Court of Claims, after an appeal had been prayed and allowed, and during the pendency in this court of such appeal, had the right to grant a motion for a new trial and this would have the effect of requiring the dismissal of the appeal in the Supreme Court.

> "The Court of Claims, by granting a new trial, has resumed control of the cause and the parties. This it had the right to do. Such a power may be somewhat analogous but it is expressly given," etc.

See also U. S. *vs.* Crusell (12 Wall., 175).

In order to save its right of appeal from a judgment of the Court of Claims it is only necessary to pray for the allowance of appeal within the ninety days. This has been repeatedly decided. See Latham *vs.* U. S. (9 Wall., 145).

Attention is also called to the fact that appellants have failed to meet the point raised by appellees that the appeal

in this case has not been taken from the final judgment, but from the order refusing to grant a new trial.

The case of Texas Railway Company *vs.* Murphy (111 U. S., 488), quoted in appellant's brief, does not meet the case. In this case "the writ of error as issued is *on its face* for the review of the final judgment," etc.

In the case before this court the appeal prayed *on its face* is from the order of January 4 overruling the motion for a new trial, and not an appeal from the final judgment of the Court of Claims, rendered May 18, 1908.

Appellant's Brief, Division II.

Here the appellant cites the case of Whitney *vs.* Cook (99 U. S., 607). This case has no application on the point discussed, for it came up on *a motion to affirm only*, and was not coupled with a motion to dismiss.

Appellant's Brief, Division V.

It is manifest that the law recited in appellant's brief and governing the awarding of contracts by the Isthmian Canal Commission and the necessity of advertising therefor (except in cases of emergency) is most general and broad in its terms. All that is required is "due public advertisement in newspapers of general circulation." The form of the advertisement is not specified, nor what it shall contain, nor the number of times it must appear, etc., etc. The result is that the officers of the Isthmian Canal Commission must of necessity have a great deal of latitude in this respect. All the cases cited by appellant on this point relate to radical departures from the advertisements on the part of municipal contractors in their bids. The powers of municipal officers are usually clearly defined and very limited in respect to awarding contracts for city work. The cases cited are predicated on facts very different from those controlling in the present case, where the Isthmian Canal

Commission has very broad and general powers. Under the law as stated practically everything is left to the discretion of the officers of the Isthmian Canal Commission.

Not only this, but the Court of Claims (R., 28) has held that the dredges in question were advertised for in such a way and for such length of time to give ample opportunity for competitive bidding.

The Court of Claims has held also that the change made by the proposal from the specifications, by which a dredge was agreed to be furnished lighter than the one suggested in the specifications annexed to the advertisement, was a *modification* of the specifications entirely within the power of the officers of the Isthmian Canal Commission to make. It must be borne in mind that the advertisement proper was one thing and the specifications annexed thereto, which were general in form, quite another.

It seems unnecessary to take up in detail the cases cited in paragraph V of appellant's opposition brief. It will be apparent upon reviewing them that they have no bearing on the case here presented.

In conclusion, it is submitted that the grounds for the motion to dismiss are ample and sufficient; that if the court does not so decide, then, under the numerous decisions of this court, there can be no question that there is sufficient color for the motion to dismiss to justify this court in considering the motion to affirm the judgment of the Court of Claims on the merits; that upon such consideration this court will find that the judgment of the court below was proper and i naccordance with the facts found; that there is nothing left for review by this court, and that there is no need for oral argument, which would subject the appellee to further delay. The record speaks for itself and the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, Appellant,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, Copartners, trading as Ellicott Machine Company, Appellee. } No. 521.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Nothing need be added to the statement of facts upon which the motion to dismiss is based. They are undisputed, and bring the case within the principle which has been established by repeated decisions of this court, namely, that when a motion for a new trial is made and entertained at the judgment term, and before the time for appeal has run, the judgment is thereby suspended and does not become final for purposes of appeal until the motion has been overruled, with the result that the time for praying an appeal begins to run only at the time of the overruling of such motion.

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Appellee's statement concerning the merits, however, is utterly insufficient, so that a full review of the facts is necessary here.

In the latter part of May or the early part of June, 1906, the Isthmian Canal Commission advertised for bids for the construction of six steel dump barges (Division IV of petition, Rec., 2). This advertisement is known in the record as "Circular 310–C," and included specifications for the barges (Rec., 15–18). These specifications described in a general way the type of barges required, viz, barges with a capacity of not less than 350 nor more than 400 cubic yards each, "of heavy construction for rough service," not less than 25 feet nor more than 32 feet in breadth, and of sufficient length to carry a full load of sand on a draft of not more than 8 feet, with hoppers of prescribed character; and then, under the heading of "Framing," prescribed, in detail, the weight and dimensions of the structural materials.

In reply to this advertisement, appellee submitted a proposal to construct the desired barges, "subject to specifications of Circular 310–C with such modifications as are shown on drawing No. 2105, dated June 7, submitted herewith" (Finding IV, Rec., 20). The plan referred to (Rec., 19), as so submitted, showed the outline of a barge 101 feet 4 inches long, 30 feet wide, and 10 feet 6 inches in height, and a note on it read as follows:

> Capacity of Bins—350 Cu. Yards. Maximum Loaded Draft When Carrying 350 Cu. Yds. Of Material Weighing 3240 Lbs. Per Cu. Yard, Not To Exceed 8′–0″,

thus fixing by this plan, within the limits allowed by the specifications, the length, width, draft, and capacity of the barge, which details, as we have already seen, were left to the discretion of each bidder, within such limits.

The bids were evidently referred by the Commission to their Engineer Maltby for examination, and on June 26, 1906, he addressed a letter to the purchasing agent of the Commission, with which he inclosed "a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers," which he submitted for the purpose of reaching an accurate understanding, before the contract was let, concerning these details. In the letter he also stated:

> It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. *It is presumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications.* (Rec., 13.)

Thereupon said purchasing agent, Ross, prepared and transmitted to appellee a draft of contract for the erection and delivery of the barges, but appellee returned said draft, suggesting that Article I thereof be rewritten, so as to provide for the construction of—

> six steel dump barges in accordance with specifications contained in Circular No. 310–C of the Isthmian Canal Commission, dated May 29, 1906; with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and

> subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract. (Rec., 3.)

In the letter returning said draft of contract, appellee also stated that—

> our drawing No. 2105 was not intended to show working details, *but solely to limit the conditions of displacements, load, and draft.* As long as these are maintained we shall be pleased to follow *such reasonable design of working details in arrangement and distribution of material* as Mr. Maltby or his inspector may require. (Division VI of petition, Rec., 2, 3.)

Appellee also, at the request of said Ross, addressed a letter, dated July 27, 1906, to Maltby, in which it submitted—

> print No. 2105 revised July 27, specifying details as called for in your letter of June 26, 1906, of hinges, hoisting gear, and method of securing timber lining to hoppers.

In said letter, too, this statement was made:

> We have also inserted on the drawing a schedule of displacement, load and draft, showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, *and this weight may be distributed in any way your representative may desire.* (Rec., 12.)

This statement was, of course, made in reply to Mr. Maltby's objection that the plan submitted did not show any details and his statement that the specifications as to framing would be insisted on; and both it and the letter to Ross, stating that the plan was not intended to show working details and that appellee would be pleased to follow such reasonable design of working details in the arrangement and distribution of materials as Mr. Maltby might require, seemed to be assurances that the materials to be used in the framing would accord with the specifications.

Thereupon an instrument was executed by the parties, providing that appellee would construct—

> six (6) steel dump barges, in accordance with specifications contained in Circular 310–C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company dated July 27, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract. (Rec., 8.)

It will be observed, therefore, that Maltby's letter stating that the specifications as to framing would have to be strictly complied with and appellee's seemingly acquiescent reply thereto were both attached to and made parts of the instrument.

Thereafter, and before beginning work upon the barges, appellee presented to the government inspector of barges, under whose supervision the barges would have been built, a list showing in detail the materials proposed to be used in constructing the barges. The materials shown on such list were "reduced in weight, size, and power of resistance" as compared with the materials specified in Circular 310–C aforesaid. (Finding VII, Rec. 22.) And upon the Government's insisting that the materials used should be in accordance with the specifications, appellee pointed out, *for the first time*, that the use of the specified materials would result in barges weighing more than 260,000 pounds, and refused to use such materials unless "the cost of the additional material was covered by a supplementary contract" (Div. XIII of petition, Rec. 5); whereupon the Commission refused to approve the submitted list of materials, and awarded the contract for the construction of the barges to another firm. This suit is brought to recover the profits lost through the Commission's alleged breach of contract, the contention of appellee being that the mere statement noted on the plan and in said letter of July 27, that the net weight of the barge would be 260,000 pounds, constituted a complete abrogation of all specifications concerning weight and size of materials and permitted construction of barges of the stated weight without any regard whatever to such specifications as to materials. The contention of the Government, on the other hand, was, and is, that the mere

notation of the net weight of the barge on the plan, especially in view of the disingenuousness of appellee's conduct in deliberately misleading the agents of the Commission by means of language which seemingly amounted to an assurance that the specifications as to weight and size of materials would be complied with, was not sufficient to show a "modification" of the specifications in respect to the weight and size of materials within the meaning of the phrase requiring the barges to be constructed in accordance with the specifications with only such modifications as were shown (which means distinctly and clearly shown) on the plan, and outlined (which means distinctly and clearly outlined) in the letter of July 27 aforesaid. Beyond that, however, the Government contends that the Court of Claims erred *as a matter of law* in refusing to consider extrinsic evidence showing that the Canal Commission was in fact misled by the conduct of appellee above referred to, at least for the purpose of determining the true construction of the instrument; *also that if the construction put upon the writing by appellee and the Court of Claims be correct, then the attempted contract is an absolute nullity because it provides for radically different barges from those for which proposals were invited and consequently was not made after competitive bidding as required by law;* and finally that, in any event, appellee is not entitled to more than nominal damages.

ARGUMENT.

I.

This appeal was prayed in apt time.

In this respect appellee's contention (brief, p. 6) is:

> That when defendant filed a motion for a new trial on the eighty-fourth day after the rendition and entry of judgment, it had the effect to *suspend* merely (and not to revive *de novo*) the further running of said jurisdictional period of ninety days; and that when said motion was overruled the United States had remaining six days within which to apply for the allowance of an appeal, and that having failed so to do within said period of six days its right to the appeal was lost.

The error of this view is that it overlooks the fact that the entry and entertainment of the motion for a new trial suspended the judgment itself, and not merely the running of the limitation as to appeals. The effect of the motion was to make the judgment a mere order *nisi*, not only from the time the motion was entered *but from the date of the judgment itself*. The entertainment of such a motion *relates back to the date of the rendition of the judgment* quite as effectually as though the court had entered an explicit order amending the judgment by making it conditional upon the disposition of a motion for a new trial, or had entered an order setting aside the judgment unless cause to the contrary should be shown. And as a result, so far as the running of the time for

appeal is concerned, the case is as though no judgment had ever been entered at all. The authorities make this entirely clear.

In *Brockett* v. *Brockett* (2 How., 238) it appeared that a final decree was entered on the 10th of May, 1843; that during the same term and on the 26th day of the same month defendant filed a petition to open the decree for certain purposes; that the court *took cognizance of the petition*, but on the 9th of June following *refused to open the decree;* whereupon, on the 15th day of June, more than a month after the entry of the original decree, an appeal was prayed. The court, speaking through Mr. Justice Story, said:

> Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within *ten days* after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court, and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given within ten days from this last period (p. 241).

This same contention, viz, that a writ of error was not obtained within ten days after the entry of final judgment, so as to entitle the plaintiff in error to a *supersedeas*, was again raised in *Memphis* v. *Brown*

(94 U. S., 715), in which case it appeared that the judgment was entered on March 2, 1876, and that at the same term and on May 20, 1876, the court *entertained*, but overruled, a motion to set aside the judgment. The court said:

> Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2 and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a *supersedeas* (pp. 717, 718).

In *Aspen Mining & Smelting Co.* v. *Billings* (150 U. S., 31) it was contended that an appeal taken to the Circuit Court of Appeals was unauthorized and void—

> because the original final decree was entered October 20, 1890, one of the days of the May term, 1890, of the Circuit Court, while the appeal to the Circuit Court of Appeals was prayed, allowed, and perfected on July 2, 1891, and at the May term, 1891, of the Circuit Court, contrary, as insisted, to the rules and the statute (pp. 34, 35).

The court, speaking through Mr. Chief Justice Fuller, held that the entertainment of the motion for rehearing deprived the original decree of its final

character, so that the statutory period of six months within which the appeal had to be taken, under section 11 of the act of 1891, did not commence to run until said motion for a new trial was disposed of. The Chief Justice said:

> The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.
>
> The rule is that if a motion or a petition for rehearing is made or presented in season and *entertained by the court*, the time limited for a writ of error or appeal *does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal* (p. 36).

In *Voorhees* v. *Noye Manufacturing Co.* (151 U. S., 135) it appeared that a final decree was entered on January 7, 1891, by the Circuit Court for the District of Nebraska. A motion for rehearing was made within the term, which was overruled on February 17, 1892. Between the stated dates the act of 1891, creating the Circuit Court of Appeals, was passed. It was held that, as the case was of a sort appealable only to the Circuit Court of Appeals after July 1, 1891, the appeal to this court would not lie, though the judgment was originally entered prior to July 1, 1891, because the entertainment of the motion for rehearing destroyed the final character of the decree

and prevented it from becoming final for purposes of appeal until the motion was overruled in 1892.

Finally, in the case of *Kingman* v. *Western Manufacturing Co.* (170 U.S., 675), which was a common-law action, governed as to procedure, however, by the statutes of Nebraska, which required judgment to be rendered at once upon return of the verdict, but permitted a motion for a new trial to be made within three days after the judgment and during the same term, it appeared that the judgment was entered on June 4, 1895, a motion for a new trial made on June 6, 1895, and overruled on December 11, 1895, more than six months after the date of the original entry of the judgment. A writ of error was thereupon allowed, and it was contended in this court that it was not taken within six months after the entry of final judgment, and should therefore be dismissed; but this court, after reviewing many authorities, reiterated the rule announced in the cases already cited and, in conclusion, said:

> The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for a new trial. We do not think it is, *and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled* (pp. 680, 681).

It will be observed that in each of the foregoing cases a final judgment or decree and not merely a verdict had been rendered, so that the suggestion in

appellee's brief (p. 7) that a peculiar and special rule should apply in the case of appeals from judgments of the Court of Claims, because the motion for a new trial is not made in such court until after final judgment, is wholly without merit.

As to the suggestion (pp. 11 and 12 of the brief) that the defeated party might, by making repeated motions for a new trial, prolong indefinitely the period for taking an appeal, it is sufficient to say that, as the cited cases show, it is an unquestioned qualification of the rule stated in those cases that the motion for a new trial or rehearing or to vacate the judgment does not affect its finality unless the motion is actually *entertained by the court*, and that therefore the court may always, by refusing to entertain the motion at all, prevent any such consequence as that deplored by appellee.

At page 8 of the brief it is said that the Government could have filed its application for an allowance of an appeal before or with its motion for a new trial, and so have saved its right to appeal, no matter how long it might have taken ultimately to dispose of the motion; and the cases of *United States* v. *Ayres* (9 Wall., 608) and *Ex parte Roberts* (15 Wall., 384) are cited as sustaining the propriety of this practice. It is admitted, however (p. 9), that in such a case it would be *improper* to *allow* the appeal *until the motion for a new trial was disposed of*. This admission (which is, of course, unavoidable) disposes of the contention (if that be appellee's contention, which is not entirely clear) that the application for appeal *should*

be made at least cotemporaneously with a motion for a new trial; for it would be absurd to *require*, under penalty of loss of the right of appeal, that the application for it be made at a time *when its allowance would be improper*. The cited cases, however, do not even sustain the propriety of the practice. In the *Ayres* case it was held that a motion for a new trial made after the appeal had been allowed under the special provision of the statute permitting such motion (in certain specified instances), *notwithstanding the pendency of the appeal*, did not constitute ground for dismissing the appeal, but that the appeal could *not* be maintained *after the motion for a new trial had been granted*. The decision therefore only amounts to this: That, because of the stated statute, the Court of Claims does not lose jurisdiction to entertain and, if it sees fit, to grant a motion for a new trial, notwithstanding the pendency of an appeal "upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States." It does not deal with the matter of *application for appeal* at all. In the *Roberts* case, although it appeared that an application for the allowance of an appeal was made during the pendency of a motion for a new trial, the *propriety of the application at that time was not considered*, but the decision was merely that, in view of the express stipulation of the parties that the appeal should not be allowed until the motion for a new trial was

disposed of, an order inadvertently entered allowing the appeal did not deprive the Court of Claims of jurisdiction of the case, but that the court could rescind such order and act upon the motion for a new trial.

There is also in the brief a suggestion that this appeal is not prayed from the final judgment, but is only prayed from the order overruling the motion for a new trial, because the prayer for appeal describes the judgment as "the judgment rendered in the above-entitled cause on the 4th day of January, 1909." This suggestion is answered by the case of *T. & P. Railway Co.* v. *Murphy* (111 U. S., 488). In that case the Supreme Court of the State of Texas entered its final judgment on *May 29*, 1883. Thereafter, it entertained a motion for a rehearing, which was denied on *December 21*, 1883. Whereupon a writ of error was sued out for review of the case in this court, describing the judgment as "rendered against the Texas & Pacific Railway Company on the *21st of December, A. D. 1883*," and the contention was "that as the judgment entered on the 21st of December was only an order overruling a motion for a rehearing," the writ of error did not bring to this court for review the final judgment of the court below. The court, after showing by the authority of *Brockett* v. *Brockett, supra*, that the entertainment of the motion for rehearing suspended the final judgment, said:

> The writ of error as issued is on its face for the review of the final judgment, not of the

> order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of opinion therefore that the judgment as entered on the 29th of May is properly before us for consideration. The motion to dismiss is overruled (p. 489).

Finally, it is contended (though the pertinency of such contention on the present motion is not perceived) that the Court of Claims had no power to entertain the motion to amend the findings made January 17, 1909. This contention overlooks the fact that the judgment did not become a finality *until January 4, 1909*, one of the days of the December term, 1908, and that the motion to amend the findings, entered a few days later and within that same term, was therefore made before the judgment had passed out of the control of the court.

II.

The question sought to be raised by the motion to dismiss has been so frequently considered and so decisively settled by this court in the cases cited under the foregoing point that there is not even color of right to a dismissal, and the motion to affirm should therefore not be considered.

The rule in this respect was announced in *Whitney* v. *Cook* (99 U. S., 607), cited in appellee's brief, page 13, as follows:

> Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion.

It has been uniformly adhered to ever since, as is shown by the other cases cited in appellee's brief. It is submitted that, in view of the clear and repeated decisions of this court already cited, the motion to dismiss is without even color of right, and is made solely in an effort to obtain a decision in this case on its merits out of its regular order and without that full argument, printed and oral, to which the court is entitled in the consideration of the questions here presented, one of which at least is of large general importance, quite aside from its bearing upon the present case. The motion to affirm should, therefore, not be entertained; but if it should be entertained, then it should be denied, because—

III.

The writing executed by the parties expresses with seeming clearness an agreement for the construction of barges of the dimensions shown on the plan, but of materials of the size, weight, and character prescribed by the specifications; and the fact that such construction would require barges of greater weight than was noted on the plan should not be permitted to alter the plain meaning of the language used.

It will be noted that Article I of the instrument executed by the parties explicitly stated that the barges were to be constructed in accordance with the specifications, except in so far as modifications of those specifications were shown on the plan and outlined in the letter of July 27, 1906. The only modifications shown on such plan or outlined in

such letter related to purely architectural features, viz, the length, width, height, draft, and capacity of the barge, and the details respecting hinges, hoisting gear, and method of securing timber lining to hoppers, unless it can be said that the statement concerning the weight of the barge constituted a "modification" of the specifications in that it abrogated entirely all provisions respecting weight and size of structural materials; for it can not be contended that the statement of the net weight of the barge made any *specific* changes in the requirements as to the character of the materials; and therefore such statement could not show or outline any mere "modification" of the specifications *regarding materials*, but could, at best, only show a purpose to entirely disregard them. But such a purpose is utterly inconsistent with the explicit reference to the specifications, because there could be no possible object in referring to the specifications at all if their provisions concerning size and weight were to be wholly disregarded, for all the architectural features of the barges were fixed by the plan, and properly so, since the specifications were not intended to be, and were not in fact, definite as to them. If, therefore, the reference to the weight of the barge could be regarded as sufficient to abrogate the specifications with reference to the weight and size of materials, then the reference to the specifications would become pure surplusage. A construction which would bring about such a result is precluded by several considerations.

(1) Maltby's letter of June 26, 1906, *which was attached to and made a part of the writing*, explicitly stating that the specifications as to framing, i. e., weight and size of materials, would be insisted on, can not be ignored; and it is utterly inconsistent with the idea that the specifications were attached to the writing without purpose.

(2) The language, "in accordance with specifications * * * with such modifications as are shown on drawing No. 2105," was adopted at the request of appellee, made with full knowledge on its part that the Commission expected and would insist upon compliance with the requirements as to weight and size of materials; and, of course, with full knowledge, too, of exactly the sort of barge which it (*appellee*) had in mind. Nothing could have been easier than to suggest phraseology which would clearly show that the specifications as to framing were to be abrogated, if appellee had desired to make its purpose apparent. Its failure to do so calls into operation, to its fullest extent, the rule that language is to be construed most strongly against the party using it, and requires, therefore, that the ambiguity arising from the fact that the barges could not be constructed of the required materials without exceeding the noted weight be resolved unfavorably to appellee. (*Garrison* v. *United States*, 7 Wall., 688.)

(3) "The rule in ethics is, that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the prom-

isee received it,' and this is the established rule at law, as well as in morals. In the language of the books, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee." (*White* v. *Hoyt*, 73 N. Y., 505, 511.)

The foregoing language was used in a case involving the construction of a contract made by correspondence, and it has peculiar force in this case, because the conduct of appellee shows conclusively that it deliberately led the officers of the Canal Commission to believe that its proposal was to construct barges in accordance with the specifications as to weight and size of materials. There can be no doubt about this. Appellee knew when it suggested the change in the phraseology of Article I, and particularly when its letter of July 27 was written, that the officers of the Canal Commission deemed strict compliance with the specifications to be vital. Its purpose to depart from those specifications could have been made entirely clear by a frank statement that if the weight of the proposed barge would be compared with the weight of a barge constructed in accordance with the specifications, it would be seen that it was not proposed to follow those specifications. Instead, appellee purposely used language which seemed to convey an assurance that the specifications would be complied with, and by that language secured the execution of the writing now before the court. All intendments should, therefore, be against it in the construction of the instrument.

(4) Finally, the construction here urged is necessary to sustain the validity of the instrument, for either that construction or the one urged by appellee must be adopted if the instrument is to be given any meaning at all; and if the *latter* construction (that is, the one urged by appellee) should be adopted, *the instrument would be void for the reason pointed out in Division V, infra.*

IV.

At most the impossibility of constructing a barge of the proposed dimensions and specified materials without exceeding the weight noted on the plan only renders the meaning of the writing ambiguous and imposes on the court the duty to ascertain by extrinsic evidence the true intent of the parties. Accordingly, the Court of Claims erred in holding as a matter of law that it was immaterial in this case whether or not the evidence showed that the minds of the parties never met.

The Court of Claims entirely misconceived the real issue in the case. It proceeded upon the assumption that the language of the writing executed by the parties was clear and unambiguous, although it explicitly held that the explanation of it in appellee's letter of July 27 *was only sufficient to put the canal officers "on inquiry"* (Rec., 24), and that the Government was seeking to contradict a plainly expressed agreement by showing that it was executed under a misapprehension of fact on the part of the Canal Commission. If such had been the case the decision of the Court of Claims would doubtless have been correct, but in truth, as has been shown in the preceding point, there is an irreconcilable repugnancy

between the language of Article I and the statement on the plan that the barges would weigh only 260,000 pounds each; and unless, for the reasons already given, the doubts are to be resolved against appellee, there is a hopeless ambiguity. In such a case the court not only may, but must resort to extrinsic evidence for the purpose of determining the true intention of the parties. The general rule on this subject was well stated in *Walker* v. *Tucker* (70 Ill., 527, 532), as follows:

> In the construction of a contract, where the language is ambiguous, courts uniformly endeavor to ascertain the intention of the parties and to give effect to that intention; but where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.

Instances of the application of the rule in this court will be found in *C. & O. Canal Company* v. *Hill* (15 Wall., 94); *Moran* v. *Prather* (90 U. S., 492); *Reed* v. *Insurance Company* (95 U. S., 23).

And since the extrinsic evidence is looked to only because without it the meaning of the parties can not be determined, it must be that when such extrinsic evidence shows indisputably that the minds of the parties were never in accord, the court can not avoid holding the attempted contract a mere nullity even though reduced to writing. In other words, although it is true that ordinarily only oral contracts are subject to attack on the ground that the minds of the

parties did not meet, nevertheless when a written instrument is so ambiguous that the court can not determine its meaning with certainty without the aid of extrinsic evidence, the case is then practically identical with the case of an oral contract. There is no rule which requires that every writing shall be given some effect. The most solemn of all writings, viz, deeds of land and wills, are frequently held void for uncertainty, and attempted contracts are constantly voided on the ground of repugnancy. In every such case the court looks to extrinsic evidence before arriving at any conclusion, but when it finds no aid in such evidence it is obliged to hold the instrument invalid. *A fortiori* is this necessary when the extrinsic evidence not only fails to clear up the ambiguity, but affirmatively shows that the minds of the parties never met.

But even if the writing could not be held void merely because the extrinsic evidence affirmatively showed that the minds of the parties did not meet, yet that fact would have an important bearing upon the construction of the instrument, especially when, as in this case, the conduct of one of the parties has been disingenuous and misleading, if not actually fraudulent. The Court of Claims therefore should have considered and found all the facts surrounding the execution of the instrument in order that it might be construed in the light of those facts. This it did not do. It even made no finding as a fact with regard to the meaning of the writing. It found only that the parties executed the instrument de-

scribed in and made part of the petition (Finding VI, Rec., 21, 22), and (in its opinion) as a *matter of law* construed this writing to permit construction of the barges without regard to the specifications as to weight and size of materials. It further decided as a matter of law that extrinsic evidence offered for the purpose of showing that the officers of the Canal Commission did not so understand the arrangement was not open to consideration.

In view of the ambiguity already pointed out, this decision was clearly erroneous.

V.

If the instrument must be construed as evidencing an agreement to construct the barges of lighter and smaller materials than those specified, it is absolutely void, because the Canal Commissioners had no authority to make a contract for the construction of a barge which did not conform at least substantially with the specifications as to the weight and size of materials.

Section 3709 of the Revised Statutes (p. 733) provides:

> All purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service.

The act creating the Isthmian Canal Commission (32 Stat., 481) by its seventh section provided that

"Said commission shall in all matters be subject to the direction and control of the President."

Pursuant to the authority so vested in him the President on April 1, 1905, issued an executive order for the government of the Canal Commission which, among other things, required that:

> Contracts for the purchase of supplies or for construction involving an estimated expenditure exceeding $10,000 shall only be made after due public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder, except in case of emergency, when, with the approval of the Secretary of War, advertising may be dispensed with.

Finally by a joint resolution approved June 25, 1906 (a month before the execution of the instrument here in question), Congress explicitly declared:

> That purchases of material and equipment for use in the construction of the Panama Canal shall be restricted to articles of domestic production and manufacture, from the lowest responsible bidder, unless the President shall, in any case, deem the bids or tenders therefor to be extortionate or unreasonable. (34 Stat., 835.)

It is not pretended, nor can it be claimed, that this case falls within the exceptions to any of the foregoing declarations of the rule requiring the letting of contracts of the present sort only after competitive bidding.

The Court of Claims found:

> That the barges which the claimants proposed to construct were different from those described in circular letter and specifications 310–C, set forth in the petition, the principal component parts or members being reduced in weight, size, and power of resistance, and thereupon the same was disapproved by the officers of the Government. The list of materials so submitted for the approval of the inspector of the Government was in conformity with said specification 310–C, as modified by the parties as set forth in article 1 of said contract. *That is to say,* the materials so submitted in conformity with said specifications *were subsequently reduced in both weight and strength to conform to the barges proposed to be constructed by claimants.*

The word "subsequently" in the last sentence of the foregoing quotation is doubtless a typographical error. The word intended must have been "substantially," for the word "subsequently" in the connection in which it appears is without meaning, and the fact is, as disclosed by the affidavit in support of the motion submitted with this brief, that said materials proposed to be used were of only about half the strength and weight of those required by the specifications. This being true, it results that the barges which appellee proposed to construct are radically different from those specified, and consequently the case is as though no advertisement at all had been made; for *the sole purpose of requiring advertisements for proposals is to obtain for the Government the benefit*

of competitive bidding, and where the different bids relate to radically different types of barges, it can not be said that the bids were competitive. Not only so, but it is practically impossible to determine which bid is the lowest, because there is no basis of comparison.

Beyond that, if after advertising for a specified thing the Canal Commission or any other department of the Government can accept a bid for a radically different thing, the door will be opened to favoritism and fraud. This case furnishes a good illustration. Suppose the Canal Commission had desired to favor appellee and had suggested to it that it would accept a barge constructed of such light materials that it would weigh only 260,000 pounds, while its specifications required and consequently all other bids contemplated the construction of a barge of such heavy materials that it would weigh 450,000 pounds. Could an easier way to evade the requirement of competitive bidding and accomplish favoritism be imagined? Would anyone claim that in the case supposed a valid contract to accept the lighter barge could be executed?

It is true the Court of Claims thought, *although the reduction in weight and size of materials was so radical that it reduced the total weight of the barge nearly one-half*, that this reduction was a mere "modification" of the specifications as to weight and size of materials (opinion overruling motion for new trial, Rec., 28), and that it was unreasonable to insist that such a mere modification could not be made. There might be force in this suggestion if the "modification" were

in fact unimportant, so that notwithstanding it the proposal was for substantially the same thing described in the specifications; but an attempt to substitute for a barge "of heavy construction for rough service" (the sort specified) a barge of light construction for easy service, can not be considered such an immaterial modification as may be permitted without violating the rule requiring competitive bidding. A brief review of the authorities showing the zealous care with which this and other courts have guarded the public interests in respect of public contracts is conclusive on this question.

In *District of Columbia* v. *Bailey* (171 U. S., 161) there was an attempt to make an agreement for the submission of a controversy between the District and Bailey to arbitration by an order entered on the minutes of the Commissioners, but not signed by any of them. A statute required that all contracts involving the expenditure of more than $100 should be reduced to writing, recorded in a book kept for that purpose, and signed by all of the Commissioners. The court said (p. 178):

> By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100 unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the

statute clearly makes the form in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of $100 can not take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei*. That the mere statement of the appointment of a referee on the minutes, without the signature of any of the Commissioners, did not comply with the requirements referred to, is too clear for discussion. The attempt to give effect to such entry as a contract, without regard to the requirements of the law, illustrates the wisdom of the statute and the evil of disregarding it; for on the trial two of the three commissioners testified, one on behalf of the plaintiff and the other on behalf of the defendant, and swore to directly opposite views as to whether or not there had been a common-law submission by the Commissioners.

In *McMullen* v. *Hoffman* (174 U. S., 639) two bidders for a contract for constructing a sewer for the city of Portland, Ore., submitted separate bids but agreed between themselves that if either secured the work it should be done by both and the profit or loss shared equally. One of such bidders did secure the contract and did the work, but refused to permit the other to participate in it or in the profits. Thereupon the latter brought suit under the contract. This court regarded the question of such general importance as to warrant the issuance

of a writ of certiorari, and when the record came before the court it was held that the supposed contract was void. The court, among other things, said (p. 651):

> Upon general principles it must be apparent that biddings for contracts for public works can not be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies, such as municipal and other corporations, at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible, and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

In *Whitney* v. *Village of Hudson* (69 Mich., 189) it was held that the common council of a village which was required by law to let contracts for public improvements to the lowest bidder had no authority to

let a contract to "Hubbard Smith" upon a bid made by "Hubbard Smith & Son."

In *Nash* v. *City of St. Paul* (11 Minn., 174) it appeared that the city authorities advertised for bids for the paving of a specified street under two separate contracts, covering different sections of the street to be paved. Nash made one bid for the entire work, and a single contract covering all of it was executed. Afterwards the city refused to permit the contract to be carried out, and the suit was brought. The court held that the contract was void because it was not "the same that was advertised."

In *Overshiner* v. *Jones* (66 Ind., 452) the suit was brought to recover the amount of a special assessment for street improvement. A statute authorized municipal authorities to cause street improvements "to be done according to the specifications by them to be adopted by contracts given to the best bidder, after advertising to receive proposals therefor." The proposal in question did not state that the work was to be done according to specifications, and it was therefore held that an alleged contract between the municipality and the bidder based upon the acceptance of the bid was void.

Wickwire v. *City of Elkhart* (144 Ind., 305) was a suit to enjoin the city from improving a certain street under a contract awarded by the common council to one Nims. One of the requirements of the advertisement for bids was that—

> All bids shall be made per square yard, setting out in full kinds of brick and other ma-

> terials to be used, also the price per running foot of curbing; and no bid shall be entertained *having within it any provisions whatsoever*. But the price per square yard shall include all the necessary work and materials in making the pavement complete. *All work specified to be completed by August 1, 1893* (p. 306).

The attempted contract entered into between Nims and the city varied from this advertisement in that it provided (1) for an extra allowance for hauling surplus dirt excavated in preparing the street for the pavement if such dirt should be hauled more than one-half mile; (2) that the work should be completed on or about *December 1, 1893*, and allowed further time in case of delay through strikes, and (3) that it provided for partial payments every thirty days to the extent of 90 per cent of the estimated value of the work done during the preceding thirty days. The court held that this alleged contract was void. The court said:

> That the common council had power to improve the street in question and to assess the cost of the improvement against the property is clearly given by the express provisions of the statute cited. It no less clearly appears from the language, and the necessary implication from these provisions, that the council, in the exercise of this power, should award contracts for the work upon and as the result of fair competitive bidding. No one could say, with the support of reason, that such a contract, awarded without receiving a bid,

would be valid. Such a contract would not be awarded pursuant to the mode pointed out by the statute. The purpose and object of the statute is manifest. It was designed to protect the interests of the property owner in securing the best results for the least expenditure and to spare municipal officers the embarrassment, if not the opportunity for corrupt action, of denying contracts to personal and political friends whose proposals are not so favorable to the property owner as that of another. It is as clearly implied from the language and purpose of the statute as if distinctly written in words that the contract must be the result of the competition. In *Platter* v. *Board, etc.* (103 Ind., 360), it was said: "The provisions of a statute intended to prevent favoritism and insure fair competition upon equal terms to all who choose to compete in bidding, are enforced with a firm hand." Was the contract in question the legitimate result of the competition offered by the council? If the council could strike from the bid the objectionable features therein, a proposition we do not consider, it is difficult to see how the contract could be made upon a basis entirely different from that contemplated by the specifications and the form of bid supplied. It is, it seems to us, perfectly clear that all competitors were entitled to place their bids upon the basis upon which the contract was to be awarded and that to require bids upon one basis and award the contract upon another was, in practical effect, but to abandon all bids (pp. 308–310).

In *People* v. *Board of Improvement* (43 N. Y., 227) it appeared that the statute authorizing the proposed improvement required the contract to be let after public advertisements for bids in accordance with the plans and specifications of the Board of Improvement. The board adopted a plan to improve the street with Belgian paving, but prepared no specifications. The engineer of the board prepared specifications for Nicolson paving, but the board never adopted them. Thereupon bids were invited for paving with Belgian, improved Belgian, Nicolson, and other improved pavements, according to plans and specifications which might be seen at the office of the engineer. It was held that under these conditions there could be no truly competitive bidding, and the court refused a mandamus to compel the execution of a contract for the work with one who claimed to be the lowest bidder. After setting out the facts showing the uncertainty of the advertisement as to the character of paving required, the court said:

> What followed might reasonably have been expected, and perhaps was what was intended by the board. Ten propositions were received, no two of which were for the same kind of pavement. It was impossible for the board upon a canvass of these offers to determine therefrom which was the lowest. This could only be determined by considering which kind of pavement proposed for was the most desirable and durable and advantageous for use and to what extent superior to the others, and then comparing these with the

like qualities of the other kinds, in connection with the cost of each, and from this determining what offer was really most advantageous as a whole for the public. The act contemplated the performance of no such duty by the board. It designed to open no such way for the exercise of favoritism. It designed that the work should be competed for as to price by contractors, and that this should be done in such a way that the lowest bidder could be determined by calculation without any exercise of judgment as to the relative advantages of different kinds of pavement. It is said by the counsel for the relator that there was a patent upon the kind of pavement it proposed for, owned by it, and that some other kinds are also patented, and that the kinds patented can compete in no other way than in the mode attempted in the present case. This may be true, but it by no means follows that this mode is permitted by the act in question. That clearly does not permit it. The board clearly had no power to award any contract upon offers received under such a notice as was published in the present case (pp. 230–231).

In *People* v. *Van Nort* (65 Barb., 331) there was an attempt by mandamus to compel Van Nort, as commissioner of public works, to execute a contract for paving certain streets. The common council of the city of New York had directed the paving of certain streets, and in pursuance to this direction proposals for the work were invited. Afterwards another resolution was adopted altering the limits

of the improvement and excepting within its limits portions of the streets which were already paved between railroad tracks, but no new advertisement was made for this work, and the right to the contract was claimed under a bid made pursuant to the first advertisement. The court said (pp. 332, 333):

> There can be no doubt as to the effect of the change of the resolution by the common council. The original proposal was from the Bowery to Mangin street. Whether there was any difference in the character of the work by limiting the distance to Lewis street does not appear; but it is evident from the second resolution that the work to be done was changed by excepting portions of the street which had been paved and by excepting the pavement between the tracks of the railway. It was irregular in the Croton board, under the circumstances, to award a contract which had been made upon proposals to do the work in a different way from that which was contemplated when the notice was published for receiving such proposals. They had no right to make such award, and if it had been done, no assessment made under it would have been valid.

The case of *Garfielde* v. *United States* (93 U. S., 242), cited on this point in appellee's brief (p. 16) is not at all pertinent. In that case proposals were invited for carrying mail (1) "between Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska," and also (2) "to begin at Port Townsend (W. T.) five hundred miles less," and the only

question considered by the court was whether or not the description of this alternative route was sufficiently definite to show that the Government desired a proposal for carrying the mails from Port Townsend to Sitka. The bid submitted was for carrying from Port Townsend to Sitka, and there was therefore no variance whatever between the advertisement and the bid, because, as the court held, the language used sufficiently showed that the alternative route was between Port Townsend and Sitka.

VI.

Even if the writing in question constituted a valid contract to construct the barges of lighter and smaller materials than those specified, yet under all the facts and circumstances of the case such contract was unconscionable. In no event, therefore, was appellee entitled to more than nominal damages.

1. Although the Court of Claims was of opinion (as a matter of law—not as a matter of fact) that the facts in this case did not show fraud on the part of appellee, and although there is perhaps lacking such actual misrepresentation as would amount in law to fraud, still the record in this case does disclose a degree of disingenuousness on appellee's part which barely stops short of fraudulent misrepresentation, by means of which the Canal Commission was induced to execute the writing in question in the mistaken belief (shown on the record now before the court by the letter of June 26, 1906, from Maltby and the rejection of the bill of materials submitted by appel-

lee; and shown on the record in the Court of Claims by the positive and uncontradicted testimony of the officers of the Canal Commission to which attention is called in the affidavit in support of the Government's motion for additional findings of fact, submitted herewith) that appellee proposed to follow the specifications as to weight and size of materials. Appellee deliberately refrained from making a frank reply to Maltby's letter and purposely suggested phraseology for the proposed agreement which was calculated to and did mislead the canal officers. That it pursued this course in the hope and expectation that its real purpose would remain undiscovered until the writing had been signed is too clear for argument. Otherwise it would have called attention to the fact, *which it knew from Maltby's letter was not then known to the canal officers*, that the specifications as to weight and size of materials could not be complied with if the barges were to weigh only 260,000 pounds each. A contract obtained by such means is clearly unconscionable.

2. And the rule is:

> Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. Where there is a written contract and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter,

but only such as he is equitably entitled to. *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Baxter* v. *Wales*, 12 Mass., 365. (*Hume* v. *United States*, 132 U. S., 406, 412.)

In that case there was an indisputable contract to furnish the Government (among a great many other things) shucks at 60 cents per pound, but the court found that the Government made the contract in the obvious supposition that the price was 60 cents *per hundredweight*, and, notwithstanding Hume's claim that his bid was intended to be at 60 cents per pound and that he largely relied on that one item for the profit of his contract, the court held that the contract to furnish shucks at such an utterly unreasonable price was unconscionable; and accordingly a judgment of the Court of Claims awarding to claimant only the fair value of the shucks furnished was sustained in pursuance of the rule above quoted. That case differed from this one only in this: That there the unconscionableness of the agreement was due to the unreasonableness of the price, while here it is due to the disingenuousness of appellee's conduct inducing the canal officers to execute an instrument which, if construed as appellee construes it, is entirely different from the one which was intended by them.

3. Appellee sues altogether for loss of profits. There is no claim that it made any expenditures for materials or incurred any liability of any sort by reason of the transaction in question. It is as well off to-day as it was on the day the writing was

signed. It suffered no loss through the Government's refusal to permit it to construct the barges other than the loss of anticipated profits. Under such circumstances, in view of its conduct, it was not in equity and good conscience entitled to any substantial damages. In any event, therefore, the Court of Claims should not have awarded more than nominal damages.

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